

## POLITICAL QUESTIONS: THE JUDICIAL CHECK ON THE EXECUTIVE

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IT has been observed that democratic processes are poor machinery for international politics.<sup>1</sup> It is surely true that the requisite capacities for secrecy, dispatch, and confident expression are not the properties of a government given to public deliberation and partisan debate over every halting move. The Constitutional Convention of 1787 was alert to these deficiencies of popular government and the Presidency was created with a view to preventing a recurrence of the hapless impotence which befell the earlier federation.<sup>2</sup> The actions of the executive branch of the government were not pretold by the open deliberation of its members; the executive establishment was possessed of a continuity lending a capacity for quick, reflexive action; and the Executive was made of a single political fabric, speaking in unison with confidence. Thus adapted in structure, the Presidency was clothed with extensive powers concomitant to its responsibilities for effectuating foreign policy and adjusting national desires to international exigencies.

Presidential power is, of course, perilous as well as opportune; the citizenry as well as the enemy can feel the impact. What is the counterpoise which holds the Executive in check when, in its dealings with foreign powers, it treads upon the interests of the citizen? The protection of the individual from an overreaching Executive is a delicate surgery for which the congressional cutlass has been thought ill-suited. Our political mores have left the operation largely to the courts who, in their independence and in their traditions, have been deemed better situated to shield private liberty from undue invasion or inhibition. This article is concerned with a problem which arises when a litigant seeks to challenge the propriety of executive action of international significance.

In fulfilling its function as an international politician, the Executive

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1. 1 DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 273 (1862).

2. 1 FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION* 63, 67, 70, 74, 140 (1911); *THE FEDERALIST* No. 64 (Jay).

acts upon two determinations. First, by the use of their intelligence sources, the executive officers appraise the international situation. Secondly, in the exercise of their expertise, the executive officers select a course of action which is responsive to the situation. These are determinations of fact and determinations of policy. The courts have thought both of these determinations to be inappropriate for judicial re-examination. The "political question" doctrine has been invoked in default of reconsideration.<sup>3</sup>

The reasons were perhaps best stated by Mr. Justice Jackson in *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Co.*:<sup>4</sup>

The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.<sup>5</sup>

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3. *Chicago & So. Air Lines, Inc. v. Waterman S.S. Co.*, 333 U.S. 103 (1948); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415 (1839); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829). The problem was foreshadowed by Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170-71 (1803). The general rule has been applied to foreclose judicial consideration of a wide variety of questions. See, e.g., *South v. Peters*, 339 U.S. 276 (1950); *Colegrove v. Green*, 328 U.S. 549 (1946); *Coleman v. Miller*, 307 U.S. 433 (1939); *Field v. Clark*, 143 U.S. 649 (1892); *United States v. Anderson*, 76 U.S. (9 Wall.) 56 (1870); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). See generally, Finkelstein, *Further Notes on Judicial Self-Limitation*, 39 HARV. L. REV. 221 (1925); Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338 (1924); Weston, *Political Questions*, 38 HARV. L. REV. 296 (1925); Note, *Political Questions as Distinguished from Judicial Questions*, 24 NOTRE DAME LAW. 231 (1949).

4. 333 U.S. 103 (1948).

5. *Id.* at 111.

The individual harmed by the Executive's foreign policy is left in an ambiguous position. He has a constitutional "right" to be protected from arbitrary or capricious acts of the Executive, but the question of whether the damaging act is arbitrary or capricious is not open to inquiry. There is surely some embarrassment to the common notions of our constitutional law in closing the courts to a private litigant who has alleged a denial of his interests by an arbitrary act of the Executive. Judge Vanderbilt has urged that such judicial deference has created a grave constitutional imbalance in the scheme of separation of powers.<sup>6</sup> What, indeed, is left of the hallowed ideal of the rule of law if the President, like Mussolini, is empowered to direct his secretaries to "take a law"?<sup>7</sup> Certainly one need not believe with Judge Vanderbilt that "universal" application of the doctrine of separation of powers is essential to the preservation of stability and liberty,<sup>8</sup> nor even with Dean Pound that judicial review is the one outstanding American contribution to politics,<sup>9</sup> to feel that we are more secure from tyranny with judicial restraints on the Executive than without them.

While the Supreme Court has not completely forsaken Bracton's ancient apothegm that the King is "under the law,"<sup>10</sup> it is nonetheless clear that some accommodation has been made between separation of powers and the forceful assertion of the judicial power on the one hand and judicial intervention in the making of international political decisions on the other.

It is well at the threshold to examine Mr. Justice Jackson's rationale in the *Chicago & Southern* case. There are four doctrinal limitations to this policy of judicial self-restraint in cases involving the international political decisions of the Executive:

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6. VANDERBILT, *THE DOCTRINE OF SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE* 97-144 (1953).

7. Chief Justice Marshall asked in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803):

To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?

See also, VANDERBILT, *op. cit. supra* note 6, at 34-35.

8. VANDERBILT, *op. cit. supra* note 6, at 144.

9. Pound, *The Place of the Judiciary in a Democratic Polity*, 27 A.B.A.J. 133, 139 (1941).

10. See the opinion of Mr. Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 n.27 (1952) (concurring opinion).

1. The rationale of restraint does not bar all judicial determinations of fact relating to international politics. The courts are free to find facts in all respects as they relate to questions other than the merit of the Executive's political decisions; the Executive's fact determination is not conclusive except with respect to the question of the validity of its own action or policy.<sup>11</sup> The odium is in upsetting national policy by second-guessing the better informed Executive.

2. If the Executive states or admits to a particular purpose for its action which is erroneous or unjustified, the action may be disregarded as unlawful even though the courts might not otherwise be justified in probing into the matter. Thus, even though the decisions underlying a course of action might be otherwise closed to re-examination and even though the Executive's action might therefore be presumed valid, it may be rendered invalid if the Executive is openly committed to a wrongful basis for action.<sup>12</sup>

3. Where the impropriety of an underlying determination is not an essential ingredient to a challenge to executive action, the courts are free to sustain the challenge if it is in other respects convincing.<sup>13</sup> To the extent that a private citizen can bring his interests within the umbrella of an absolute prohibition, he is secure from executive encroachments in that the fact context and policy motivations of the exercise of executive power are there irrelevant. Generally, however, the executive power will depend for its efficacy upon the circumstances of its exercise. Occasions for the exercise of this judicial power of last resort are rare and there is room for considerable bureaucratic brutality within the confines thus imposed, but it is well to understand that the outer limits of the penumbra of executive power may be subject to judicial definition.

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11. *E.g.*, *Vermilya-Brown Co. v. Connell*, 335 U.S. 377 (1948). The executive decision may be relevant, even where it is not deemed binding on the courts. *Bank of China v. Wells Fargo Bank & Union Trust Co.*, 104 F. Supp. 59, 64 (N.D. Cal. 1952) (dictum).

12. The situation may be the same where the Executive is committed by a motion to dismiss to a wrongful basis for its action. A recent case is *Shachtman v. Dulles*, 225 F.2d 938 (D.C. Cir. 1955). But whether a motion to dismiss a complaint alleging that executive action was based on a wrongful reason is a sound motion may depend on the obligation of the Executive to disclose any reason. If no finding is necessary and the reasons for executive action may remain veiled, then the allegations in such a complaint need not be controverted. See note 73 *infra*.

13. *E.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

4. The courts must, of course, determine their own jurisdiction and to this end the courts must exercise some political judgment in identifying a "political question" as here defined.

We shall now examine in greater detail the sources and character of the executive power<sup>14</sup> with a view to determining, in the light of the political question doctrine, the proper juxtaposition of the judicial power. The Constitution vests the Executive with the following powers pertinent to its dealings in foreign relations:

- (1) the administrative powers exercised by the Executive as the amanuensis of Congress, including the power to act between and beyond the express commands of Congress;
- (2) the recognition power exercised in the exchange of diplomatic officials with foreign governments;
- (3) the power exercised as commander-in-chief of the army and navy;
- (4) the treaty power exercised in the negotiation of international agreements.

## I

### THE FAITHFUL EXECUTION OF THE LAWS

Article II of the Constitution is made of the most malleable language; the structure of the presidential office was left in large measure to future architects. While the courts have given the broadest interpretation to the express statutory and constitutional powers of the Executive, they have on occasion departed from the terms of article II to apply a latitudinarian concept of the presidential office. The Supreme Court in sustaining executive action, has embraced at times three justifications which are independent of any sanction expressed either in the Constitution or in a statute.

Chief Justice Taft once embraced the Hamiltonian interpretation of the "executive power" vested in the President.<sup>15</sup> He took these words to repose substantive powers on the office.<sup>16</sup> By Hamilton's reading, the Presidency was thus imbued with a power resembling that of

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14. See CORWIN, *THE PRESIDENT: OFFICE AND POWERS* (3d ed. 1948).

15. U.S. CONST. art. II, § 1.

16. *Myers v. United States*, 272 U.S. 52, 118 (1926). Cf. Mr. Justice Brewer's analysis of the "judicial power" in *Kansas v. Colorado*, 206 U.S. 46, 82 (1907).

George III, subject only to such limitations as might be imposed by the subsequent sections of article II.<sup>17</sup> This Trojan Horse has not been ridden since, but the precedent remains.<sup>18</sup>

Of only slightly greater present interest is the doctrine of Mr. Justice Sutherland in *United States v. Curtiss-Wright Export Corp.*<sup>19</sup> When confronted with the contention that the joint resolution authorizing the Chaco arms embargo constituted an improper delegation of legislative power, Mr. Justice Sutherland took refuge in broad statements of the power of the federal government<sup>20</sup> and its executive branch. Insofar as the case holds that the rule of nondelegability has less vitality in the sphere of foreign relations, it seems established law.<sup>21</sup> But this is of slight importance in view of the present posture of that doctrine.<sup>22</sup> Of somewhat greater interest is the obiter dicta of "inherent" executive power. The case is often cited for the proposition that the President has "inherent" power in dealing with problems of

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17. See CORWIN, *THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS* 7-32 (1917).

18. *Myers v. United States*, 272 U.S. 52 (1926), sustained the power of the President to remove a Postmaster in contravention of an act of Congress. This holding was greatly limited in *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935). *But cf.* *Morgan v. TVA*, 115 F.2d 990 (6th Cir. 1940), *cert. denied*, 312 U.S. 701 (1941). Chief Justice Taft's doctrine was given tacit approval in Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L.J. 345, 349-50 (1955), and by the Court in *Ex parte Quirin*, 317 U.S. 1, 26 (1942), and by Chief Justice Vinson in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 681 (1952) (dissenting opinion), but it was roundly rejected by Mr. Justice Jackson. *Id.* at 640-41.

19. 299 U.S. 304 (1936).

20. The statements of "inherent" federal power were obiter dicta in that the power to regulate or restrict international arms shipment could hardly be questioned to exist under the commerce clause. But some such "inherent" power does seem to exist. See *Dennis v. United States*, 341 U.S. 494, 519 (1951) (concurring opinion of Frankfurter, J.); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Chae Chan Ping v. United States*, 130 U.S. 681 (1889) (upholding power to expel aliens—*quaere* whether this power could be assimilated to the foreign commerce power); *United States v. Peace Information Center*, 97 F. Supp. 255 (D.D.C. 1951) (upholding power to protect the government from subversion); *cf.* *Jones v. United States*, 137 U.S. 202 (1890) (upholding power to claim uninhabited island); see also, *THE FEDERALIST* No. 41 (Madison).

21. *United States v. Rosenberg*, 150 F.2d 788 (2d Cir.), *cert. denied*, 326 U.S. 752 (1945); *United States v. Von Clemm*, 136 F.2d 968 (2d Cir.), *cert. denied*, 320 U.S. 769 (1943); *Colonial Airlines, Inc. v. Adams*, 87 F. Supp. 242 (D.D.C. 1948); *United States v. Bareno*, 50 F. Supp. 520 (D. Md. 1943).

22. See *United States v. Rock Royal Co-operative*, 307 U.S. 533 (1939).

foreign relations. But when does such a power find application?<sup>23</sup> No court has yet rested a case upon Mr. Justice Sutherland's brave doctrine, although it has often been used as a buttress. It is never treated in such terms, but the case seems more accurately taken to signify only an increased deference to the Executive where it is dealing with problems of foreign relations.

The third basis of executive independence dates from Locke's concept of the executive prerogative<sup>24</sup> and finds implied sanction in the constitutional power to ". . . take Care that the Laws be faithfully executed . . ." <sup>25</sup> The Executive must tailor the laws of Congress to meet specific and often unforeseen situations; this obligation gives rise to a quasi-legislative power, exercisable interstitially, or even in areas where there has been no congressional action at all.<sup>26</sup> Since this is a power to interpolate the "will" of Congress, or to preserve the situation so that Congress will have something left to act upon,<sup>27</sup> it seems to follow that it is coterminous with the legislative power.<sup>28</sup> Because

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23. It can have application only if we take seriously the implications of the characterizations of the President as the "sole organ of foreign relation." It might then follow that the President had some power superior to that of Congress within Congress' jurisdiction. Cf. 39 OPS. ATT'Y GEN. 484, 489 (1940). *But cf.* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 *passim* (1952); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1806).

24. LOCKE, OF CIVIL GOVERNMENT 199-203 (Everyman's Library 1943).

25. U.S. CONST. art. II, § 3.

26. The Executive may invoke the judicial power to protect federal interests without statutory authorizations. *Sanitary District v. United States*, 266 U.S. 405 (1925); *Kern River Co. v. United States*, 257 U.S. 147 (1921); *United States v. San Jacinto Tin Co.*, 125 U.S. 273 (1888). This power is limited by the "fiscal function" doctrine. See *United States v. Standard Oil Co.*, 332 U.S. 301 (1947); *Gartner v. United States*, 166 F.2d 728 (9th Cir. 1948). The Executive may remove obstructions to the flow of interstate or foreign commerce without statutory authorization. *In re Debs*, 158 U.S. 564 (1895). *But cf.* *United States v. Washington Improvement & Development Co.*, 189 Fed. 674 (C.C.E.D. Wash. 1911). The Executive may extend the duties of United States marshals without statutory authorization. *In re Neagle*, 135 U.S. 1 (1890); *cf.* *United States v. Mullin*, 71 Fed. 682 (D. Neb. 1895). The power is not limited to emergencies; the Executive's actions, like those of an agent, may be tacitly ratified by the silence of Congress. *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915). Probably the Executive is entitled to extra deference in the area of foreign relations.

27. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 704 (1952) (dissenting opinion of Vinson, C.J.).

28. A similar power may be appended to the treaty power, but as this may rest on a somewhat different basis, we shall consider it in connection with the treaty power.

it is an "emergency power,"<sup>29</sup> it is often used jointly in some confusion with the President's power as commander-in-chief to justify executive action.<sup>30</sup> This executive power may be at fullest bloom in areas where Congress has taken no action; it is then easier to sustain the supposition that Congress did not foresee the problem at hand. This leaves the Executive free for its own implementations of policy.

Some helpful illumination was shed on this last point during the controversy concerning the landing of submarine cables. President Grant refused to permit the landing of a cable by a French company in 1872 and informed Congress of his action; this practice was repeated several times<sup>31</sup> and was upheld by a district court in 1896<sup>32</sup> and by Attorney General Richards in 1898.<sup>33</sup> In 1921, the same power was exerted against the Western Union Company, which had been attempting to connect with a British cable running from Brazil to the Caribbean. The Navy prevented the landing of the Western Union cable in Florida and the Attorney General then sought to enjoin both the landing of the new cable and the receiving of messages sent over the British cable through Western Union's old facilities in Cuba. Judge Augustus Hand denied the injunction<sup>34</sup> on the ground that Western Union, as a domestic corporation, had been otherwise

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29. Chief Justice Hughes defined the relationship between emergency and "power":

While emergency does not create power, emergency may furnish the occasion for the exercise of power. "Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934).

30. See *United States v. Montgomery Ward & Co.*, 150 F.2d 369 (7th Cir.), *dismissed as moot*, 326 U.S. 690 (1945) (upholding seizure of wholesale business); 30 OPS. ATT'Y GEN. 291 (1914) (upholding seizure of wireless station). *But cf.* *Durand v. Hollins*, 4 Blatch. 451 (2d Cir. 1860), where the power of the Executive to employ naval forces to protect American citizens in Nicaragua was defended as an exercise of the executive prerogative.

31. See CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 239 (3d ed. 1948).

32. *United States v. La Compagnie Francaise Des Cables Telegraphiques*, 77 Fed. 495 (C.C.S.D.N.Y. 1896). Judge Lacombe said:

. . . [W]ithout the consent of the general government, no one, alien or native, has any right to establish a physical connection between the shores of this country and that of any foreign nation. Such consent may be implied as well as expressed, and whether it shall be granted or implied is a political question, which, in the absence of congressional action, would seem to fall within the province of the executive to decide. *Id.* at 496.

33. 22 OPS. ATT'Y GEN. 13 (1898).

34. *United States v. Western Union Tel. Co.*, 272 Fed. 311 (S.D.N.Y.), *aff'd per curiam*, 272 Fed. 893 (2d Cir. 1921), *rev'd by stipulation*, 260 U.S. 754 (1922).



regulated by Congress, and was entitled to engage in the activities in question by virtue of the Post Roads Act of 1866<sup>35</sup> and the company's congressional franchise passed the same year<sup>36</sup> and hence, that Congress had effectively "filled the field," barring unauthorized executive action. Judge Hand said:

It is argued that in spite of the Act of July 24, 1866, and the Interstate Commerce Act, by which certain features of defendant's business may be regulated, and although both acts apparently cover telegraphic business originating in this country and destined for foreign countries, yet the power of the Executive remains to prevent a domestic corporation for many years engaged under a federal franchise in a foreign cable business from making new cable connections. It may be that the President, before Congress has acted, may exercise this power in respect to a foreign cable company having no congressional franchise. This is claimed to have been substantially the situation in the case of the French Cable Company, decided by Judge Lacombe. But in respect to the Western Union, which by the Act of July 24, 1866 . . . possesses a federal franchise covering a business with foreign countries and regulated as to rates by an agency of the Government created by Congress, it seems unreasonable to hold that Congress has not occupied the field and legislated so generally in regard to this defendant that it has withdrawn it from the exercise of executive power in respect to foreign cable connections.<sup>37</sup>

Judge Hand's opinion was prophetic of the recent Steel Seizure Case.<sup>38</sup> Little purpose would be served by recounting the facts of that case which are familiar to all, or by another exhaustive analysis of the opinions.<sup>39</sup> It is sufficient for our purpose to observe that in the doctrine of executive power which was urged upon it, the Supreme Court saw a headless horseman. Like Ichabod Crane, the Court rode off in all directions at once. A significant thread of concord ran through all of the seven separate opinions on this point, that the power of Congress in its legislative domain is superior to any power of the Executive. Congress could prevent or forbid the seizure

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35. Post-Roads Act, c. 230, 14 STAT. 221 (1866).

36. Act of May 5, 1866, c. 74, 14 STAT. 44.

37. *United States v. Western Union Tel Co.*, 272 Fed. 311, 321-22 (S.D.N.Y. 1921).

38. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

39. See Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53 (1953); Kauper, *The Steel Seizure Case: Congress, The President and the Supreme Court*, 51 MICH. L. REV. 141 (1952).

of the steel mills; the controversy on the bench went to the effect to be given the expressions of Congress on the subject and also to the question whether the President had any power at all in the premises, even absent the legislation. It now seems clear, if it was not before,<sup>40</sup> that Congress has always the stronger hand within its legislative domain.

When Congress does not act, the courts can serve as only a limited check on the Executive. The Executive possesses circumstantial power. Where the circumstances are international and the action political, the primary conceptual limitation on this power of the Executive, viz., that its exercise must be justified by the circumstances, is largely unenforceable. Where foreign relations are involved, the courts can intervene only where Congress or the Constitution expressly or implicitly forbids the Executive's action without regard to the circumstances. With regard to independent executive invasions of the personal sanctuaries of the Constitution, there are no decided cases, but it would seem that the protection accorded personal rights should not be impaired by the absence of the congressional sanction. Thus the cases limiting Congress' power to restrict personal rights are at least as applicable to the executive power.<sup>41</sup>

It is against this setting of executive independence that Congress legislates. When Congress acts, the problem of judicial review becomes subject to a new dimension. The existence and scope of the judicial function is then in large measure defined by Congress. Extensive though the power of Congress over the federal courts may be,<sup>42</sup> there are both maximum and minimum limits on the extent of the judicial restraints which Congress may provide.

Congress may not require the courts to decide questions which are not justiciable within the purview of article III.<sup>43</sup> It is traditional that policy-making discretion cannot be vested in the courts; a judge

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40. See *Little v. Barreme*, 6 U.S. (2 Cranch) \*169 (1804), setting aside seizure of a ship in violation of implied congressional prohibition. The case was relied upon by Mr. Justice Clark in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 660 (1952) (concurring opinion).

41. It is probably of no significance, but the first amendment applies by its terms only to Congress.

42. See *Yakus v. United States*, 321 U.S. 414 (1944); *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323 (1938); *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868); *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850).

43: See *Ashwander v. TVA*, 297 U.S. 288, 341-56 (1936) (concurring opinion of Brandeis, J.).

cannot substitute his judgment for that of the executive officer who wields discretionary power.<sup>44</sup> Only when Congress imposes a "ministerial" duty upon the Executive can the courts set aside his action for the slightest misfeasance.<sup>45</sup> Where the Executive is to exercise discretion, the judicial power can be asserted only upon a finding of abuse of discretion or arbitrary or capricious action as when the Executive's decision is supported by insufficient evidence.<sup>46</sup> And where the situation in which the discretion is exercised is of an international political nature, even this review is constitutionally foreclosed.

This is demonstrated in the judicial review of Civil Aeronautics Board certification proceedings. Where the route in question is domestic, the courts may properly inquire whether the Board's decision as to which of the competing carriers will best serve the public interest is supported by substantial evidence, or whether the Board has abused its discretion.<sup>47</sup> But where the route involved reaches to foreign terminals, international considerations are germane; as the executive action embodies an international political decision, it is beyond judicial scrutiny. Upon this last point, the Supreme Court was in full agreement in the *Chicago & Southern* case.<sup>48</sup>

Similar is the judicial review of the Executive's administration of the immigration laws. The federal courts have reviewed executive discretion embodied in orders denying aliens enlargement for bail,<sup>49</sup> fixing bail,<sup>50</sup> denying admission of aliens under bond,<sup>51</sup> denying sus-

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44. See *FPC v. Idaho Power Co.*, 344 U.S. 17 (1952); *Federal Radio Commission v. General Elec. Co.*, 281 U.S. 464 (1930); *Keller v. Potomac Elec. Power Co.*, 261 U.S. 428 (1923).

45. See e.g., *Barr v. United States*, 324 U.S. 83 (1945).

46. See *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938).

47. *United Air Lines v. CAB*, 155 F.2d 109, 171 (D.C. Cir. 1946) (dictum); cf. *Delta Air Lines v. Summerfield*, 347 U.S. 74 (1954).

48. *Chicago & So. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948). See also *Trans World Airlines, Inc. v. CAB*, 184 F.2d 66 (2d Cir. 1950), *cert. denied*, 340 U.S. 941 (1951); *Pan American Airways Co. v. CAB*, 121 F.2d 810 (2d Cir. 1941).

49. *United States ex rel. Belfrage v. Shaughnessy*, 212 F.2d 128 (2d Cir. 1954); *United States ex rel. Young v. Shaughnessy*, 194 F.2d 474 (2d Cir. 1952); *United States ex rel. De Geronimi v. Shaughnessy*, 187 F.2d 896 (2d Cir. 1951). See also *Carlson v. Landon*, 342 U.S. 524 (1952).

50. *United States ex rel. Potash v. District Director*, 169 F.2d 747 (2d Cir. 1948); *Yarnish v. Phelan*, 86 F. Supp. 461 (N.D. Cal. 1949).

51. *United States ex rel. Ickowicz v. Day*, 18 F.2d 962 (2d Cir. 1927).

pension of deportation,<sup>52</sup> or denying the aliens permission to leave the country voluntarily.<sup>53</sup> The scope of this review has been very narrow. Judge Learned Hand said in *United States ex rel. Kaloudis v. Shaughnessy*<sup>54</sup> that:

... [U]nless the ground stated is on its face insufficient, [the alien] ... must accept the decision, for it was made in the "exercise of discretion," which we have again and again declared that we will not review.<sup>55</sup>

Judge Hand suggested that review would be available if suspension of deportation was denied because the alien had become addicted to baseball or had bad table manners. Such a reason would be so clearly irrelevant that the court could find a transgression of the legislative command. Thus, an order resting upon an inference of moral turpitude drawn from the alien's exercise of the self incrimination privilege was set aside as an abuse of discretion.<sup>56</sup> But, where the Executive introduces any plausible basis for the order, the inquiry is closed.<sup>57</sup>

The Immigration and Nationality Act of 1952 authorized the Attorney General to withhold deportation to a country in which, in his opinion, the alien would be subject to physical persecution.<sup>58</sup> The Second Circuit has held the exercise of this discretion to be wholly beyond reach of judicial scrutiny; the considerations involved relate to international politics and are not suited to judicial inquiry.<sup>59</sup> The

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52. *United States ex rel. Brzovich v. Holton*, 222 F.2d 840 (7th Cir. 1955); *United States ex rel. Adel v. Shaughnessy*, 183 F.2d 371 (2d Cir. 1950); *United States ex rel. Knauff v. McGrath*, 181 F.2d 839 (2d Cir. 1950), *dismissed as moot*, 340 U.S. 940 (1951); *United States ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489 (2d Cir. 1950); *United States ex rel. Weddecke v. Watkins*, 166 F.2d 369 (2d Cir.), *cert. denied*, 333 U.S. 876 (1948); *United States ex rel. McLeod v. Garfinkel*, 129 F. Supp. 591 (W.D. Pa. 1955).

53. *United States ex rel. Frangoulis v. Shaughnessy*, 210 F.2d 572 (2d Cir. 1954); *United States ex rel. Bartsch v. Watkins*, 75 F.2d 245 (2d Cir. 1949); *United States ex rel. Salvetti v. Reimer*, 103 F.2d 777 (2d Cir. 1939); *cf. United States ex rel. Mazur v. Commissioner*, 101 F.2d 707 (2d Cir. 1939).

54. *United States ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489 (2d Cir. 1950).

55. *Id.* at 490.

56. See *United States ex rel. Belfrage v. Shaughnessy*, 212 F.2d 128 (2d Cir. 1954).

57. See *Carlson v. Landon*, 342 U.S. 524 (1952); *United States ex rel. Knauff v. McGrath*, 181 F.2d 839 (2d Cir. 1950) (concurring opinion of Learned Hand, J.).

58. 8 U.S.C. § 1253(h) (1952).

59. *United States ex rel. Dolenz v. Shaughnessy*, 206 F.2d 392 (2d Cir.), *cert. denied*, 345 U.S. 928 (1953); *cf. Ludecke v. Watkins*, 335 U.S. 160 (1948).

court can ascertain that the executive officer has, in fact, decided the question;<sup>60</sup> but there is no benchmark by which to judge the reasonableness of the decision.<sup>61</sup>

Here the paradox arises. Where the private interest is one within the cognizance of the due process clause, the Constitution requires that any impingement thereof shall be "reasonable" or colorably responsive to the circumstances in which the impingement occurs. But the Constitution also requires that the courts shall not, even at the direction of Congress, determine the reasonableness of the offensive executive action where foreign policy judgment is involved. The constitutional right is then non-Hohfeldian to say the least. The courts might have sought to resolve the dilemma by weighing the relative importance of the particular private interest involved against the need for judicial restraint in each case. While this would be ordinary judicial technique, it would evade the thrust of the political question rationale; not only the merits of the underlying executive decision, but also the extent of the need for judicial restraint in any particular case involving such a decision are imponderables which cannot be fully appreciated by the judiciary. A very severe case in point is *Ludecke v. Watkins*.<sup>62</sup> In that case the Supreme Court declined to review executive determinations that Germany was an enemy nation in 1948 and that Mr. Ludecke, a German national, was "dangerous." He was subject to deportation without the protections of the due process clause to which aliens are ordinarily entitled.<sup>63</sup> The executive decision was there plainly erroneous, and it is difficult to imagine that a contrary decision would have handicapped or embarrassed the nation's foreign policy in any appreciable way. But an appraisal of the degree of danger latent in judicial interference

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60. *Lim Fong v. Brownell*, 215 F.2d 683 (D.C. Cir. 1954); cf. *Mahler v. Eby*, 264 U.S. 32 (1924); *United States ex rel. Di Paola v. Reimer*, 102 F.2d 40 (2d Cir. 1939).

61. There appears to be a similar limit on the extent to which Congress can withdraw administrative action from judicial review. See DAVIS, *ADMINISTRATIVE LAW* 856-65, 918-22 (1951); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts*, 66 HARV. L. REV. 1362 (1953).

62. 335 U.S. 160 (1948). Black, Douglas, Murphy, and Rutledge J.J., dissented in this case.

63. The right of the friendly alien to the protections of substantive due process of law was acknowledged in *Vajtauer v. Commissioner*, 273 U.S. 103, 106 (1927) (dictum); cf. *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950); *Kwock Jan Fat v. White*, 253 U.S. 454 (1920). In the *Ludecke* case, the alien asserted a right to notice and hearing; this being denied, it would seem to follow a fortiori that substantive due process protections are unavailing.

requires political acumen with which the courts are not equipped.<sup>64</sup> The answer to the paradox appears to be that the Constitution is addressed to officials other than judges; the Constitution contemplates that the Executive as well as the judiciary shall be charged with the protection of the "rights" created.

There are nevertheless occasions for judicial restraint upon the Executive's international activities. Questions relating to the Executive's procedures may in some cases be determined with no violence to the political question doctrine. Returning to the *Chicago & Southern* case, the Board ruling which was not reviewed was infected by the power of revocation and modification conferred upon the President by the statute. The majority of the Court held that the presidential order adopting the Board ruling was not reviewable and that, despite statutory provisions for review, the Board ruling itself could not be reviewed seriatim because it was advisory and not final within the purview of the ancient rule of *Hayburn's Case*.<sup>65</sup> Four justices dissented<sup>66</sup> on the ground that the Board action was separable. In writing the dissenting opinion,<sup>67</sup> Mr. Justice Douglas suggested that a logical application of the Court's holding would incapacitate the Court for review of the Board's faithfulness to procedural requirements, as well as for review of its discretionary judgment on the evidence.<sup>68</sup> If the Board denied an interested party the notice and

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64. This question requires a quantitative analysis which is to be distinguished from the qualitative analysis made by the courts in the initial identification of the political question raised.

65. 2 U.S. (2 Dall.) 409 (1792). U.S. CONST. art. III, requires that the exercise of the judicial power must be final and binding on the parties, and not be subject to amendment. *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851); *Hayburn's Case*, *supra*.

66. Black, Douglas, Reed, and Rutledge, J.J.

67. *Chicago & So. Air Lines, Inc. v. Waterman S.S. Co.*, 333 U.S. 103, 114 (1948).

68. The same problems may also arise under the Tariff Act of 1930, 19 U.S.C. § 1351 (1952), which authorizes the President to make limited changes in duty rates. The Supreme Court held the exercise of this power to be beyond review, even where the importer alleged an abuse of administrative discretion in translating production cost from Japanese yen to dollars at an exchange rate based upon an arbitrarily chosen base period. *United States v. George S. Bush & Co.*, 310 U.S. 371 (1940). The Court employed language contrary to the traditional notion that the substantiality of the evidence or the limits of administrative discretion are questions of law which a court may decide. *Id.* at 380. Although the opinion is not clear in this respect, it would seem that the practical considerations which silently moved the Court to deny review are very similar to those stated by Mr. Justice Jackson in the *Chicago & Southern* case. Much of the probative evidence before the Executive might be un-

hearing required by statute, could the courts not set aside the subsequent presidential order on the ground that the Executive, having failed to comply with the statutory condition precedent, had no power to decide the question improperly put before him?<sup>69</sup>

There will be some cases in which no imaginable circumstances could justify the arbitrary procedure employed by the Executive,<sup>70</sup> but otherwise it is doubtful that a court could properly impose such procedural requirements as an application of the due process clause. The due process clause requires only a reasonable procedure under the circumstances, and, if the circumstances are inscrutable, a non-justiciable question is raised.<sup>71</sup> But, where the requirements are imposed by Congress, an ultimate question of power is raised which can always be decided without regard to the circumstances.<sup>72</sup>

We have reserved for consideration the problems faced by the courts in identifying the political character of questions raised. In the course of determining their jurisdiction, the courts must determine whether the challenged executive action embodies political judgment. Is it enough that there is a possibility that the Executive may have exercised political judgment? The point was not discussed directly by Mr. Justice Jackson in the *Chicago & Southern* case. The parties in that case did not suggest, however, that the particular presidential order in question did in fact embody any judgment other than a purely negative judgment that the CAB certification would not be

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available to the Court, and the President might well consider the political consequences of the increased duty in making his decision. The report of the Tariff Commission is similar to the certification of the Civil Aeronautics Board in that neither agency passes on secret evidence and neither makes political decisions in the constitutional dialectic, but the decisions of both agencies are subject to the approval of the President who makes the political decisions. It would seem that the courts should be able to set aside the tariff modification by the President for failure to maintain the procedural standards required by statute, if Congress so provided with sufficient clarity.

69. Mr. Justice Cardozo in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), said:

If legislative power is delegated subject to a condition, it is a requirement of constitutional government that the condition be fulfilled. *Id.* at 448.

70. See, e.g., *Nathan v. Dulles*, 129 F. Supp. 951 (D.D.C. 1955); *Clark v. Dulles*, 129 F. Supp. 950 (D.D.C. 1955); *Bauer v. Acheson*, 106 F. Supp. 445 (D.D.C. 1952). These cases held that persons seeking passports are entitled to notice and hearing prior to the exercise by the State Department of its discretion under the Passport Act, 22 U.S.C. § 211a (1952). The brief opinions, however, did not acknowledge the political character of the executive act.

71. See note 64 *supra*.

72. See note 13 *supra*.

harmful to our relations with Cuba. The Court was apparently satisfied by the possibility, however remote, that the President considered matters which might not be properly scrutinized by it. It is possible that, at least where constitutionally protected interests are involved, the courts should probe further. The Executive surely cannot be under constitutional compulsion to give full disclosure of its reasons since this would abuse the constitutional desideratum of secrecy. But should not the injured individual have a judicially enforceable right to a rationalization for his abuse?<sup>73</sup> The Executive might be required to state at least that his action embodied political judgment. This would provide an honor system check on the Executive and permit judicial relief in cases where such relief might otherwise be needlessly withdrawn. A public statement would also give the individual a better opportunity to focus public opinion on his situation and thereby exploit the political check on the Executive. Even such a limited disclosure might, however, have serious consequences in some cases and it is doubtful that the courts will, as a matter of the constitutional right of the individual, thus invade the executive domain. It is nevertheless clear that Congress, where its power is dominant, can require the Executive to make findings of any kind and the courts may prop-

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73. This question may arise soon in the context of the passport cases. The State Department has been accustomed to denying or revoking passports, assigning as the reason that the proposed trip would not be in the "best interests" of the United States. Despite the possible contrary implications of the cases cited in note 70 *supra*, and in *Schachtman v. Dulles*, 225 F.2d 938 (D.C. Cir. 1955), see note 12 *supra*, it would seem that political judgment is involved in the exercise of the State Department's discretion and that the "best interests" passport refusal is immune from review for substantive error. For the contrary view and the background of the problem, see Notes, *Passport Refusal for Political Reasons*, 61 YALE L.J. 171 (1952); *Passport Denied*, 3 STAN. L. REV. 312 (1951). The Yale notewriter is particularly convincing, in saying that the State Department practice is less than responsive to the needs of a democratic society. In his case for judicial review, the notewriter is successful in rebutting the State Department's contention that its rulings are political because of the ancient function of the passport in entitling the bearer to protection by our government; it is true that the modern function of the passport is rather to restrict the freedom of movement of the individual. But it is here suggested that the function of the passport is not controlling as to reviewability; the factor which does control reviewability is the character of the considerations underlying the passport refusal. It is surely true that the United States is closely identified in the minds of foreign residents with the tourists we send abroad; there is nothing remiss in Congress authorizing the Secretary of State to deny egress to citizens who will antagonize our friends and allies in the current struggle. And a decision as to which applicants for passports are likely to antagonize must necessarily embody a political prophecy and a finding of fact which the courts cannot properly or adequately reappraise.



erly enforce such requirements as conditions precedent to the lawful exercise of executive power in the same manner as other procedural requirements imposed by Congress may be enforced.

The extent to which the courts can act as an effective check on the Executive exercising its administrative powers is thus largely in the hands of Congress. Congress can limit the scope of application of the political question doctrine by requiring the Executive to identify those acts which are political and, most importantly, Congress can impose the procedural safeguards that in practice may be more crucial to the individual than the substantive standards which the courts, in this sphere, are wholly debilitated from enforcing.

## II

### THE RECOGNITION POWER

The recognition power arises from the President's constitutional authority to appoint the emissaries of the United States<sup>74</sup> and to receive the emissaries of other countries.<sup>75</sup> The judiciary has from the beginning avoided transgression of the Executive's recognition policy, and the executive decisions have been characterized as political and beyond the reach of judicial review.<sup>76</sup> The unrecognized government has been denied access to our courts.<sup>77</sup> The courts have been bound by executive practice in determining questions relating to international boundaries,<sup>78</sup> the diplomatic immunity to be accorded foreign representatives,<sup>79</sup> or the sovereign immunity accorded foreign governments.<sup>80</sup>

74. U.S. CONST. art. II, § 2, cl. 2.

75. U.S. CONST. art. II, § 3.

76. *United States v. Pink*, 315 U.S. 203 (1941); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *Williams v. The Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415 (1839); *cf. Jones v. United States*, 137 U.S. 202 (1890); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829).

77. *Republic of China v. Merchants' Fire Assur. Corp.*, 30 F.2d 278 (9th Cir. 1929); *Russian Republic v. Cibrario*, 235 N.Y. 255, 139 N.E. 259 (1923); *cf. Russia v. Lehigh Valley R.R.*, 293 Fed. 135 (S.D.N.Y. 1923) (permitting suit by the Kerensky government).

78. *Jones v. United States*, *supra* note 77; *Williams v. The Suffolk Ins. Co.*, *supra* note 77. *But see Vermilya-Brown Co. v. Connell*, 335 U.S. 377 (1948); Fuchs, *Administrative Determinations and Personal Rights in the Present Supreme Court*, 24 IND. L.J. 163 (1949).

79. *In re Baiz*, 135 U.S. 403 (1890); *United States v. Liddle*, 26 Fed. Cas. 936, No. 15598 (C.C. Wash. 1808); *Trost v. Tompkins*, 44 A.2d 226, 229 (D.C. Mun. Ct. App. 1945) (dictum).

80. *Ex parte Peru*, 318 U.S. 578 (1943); *Compania Espanola v. Nevemar*, 303 U.S. 68, 74 (1938) (dictum).

With regard to these questions, the courts have practiced remarkable self-restraint. Judicial deference has extended so far as to respect executive requests in the deciding of specific cases involving foreign governments or their activities.<sup>81</sup> Where the Executive "recognizes and allows" a claim of sovereign immunity, the courts conform to that policy.<sup>82</sup>

The recognition power was given unexpected scope in the litigation arising from the Litvinov Agreement of 1933. Prior to the recognition effected by that agreement, the nationalization decrees of the Soviet government had quite naturally been dishonored as to property situated in this country.<sup>83</sup> And thereafter it had been assumed that the Russian decrees could at best reach only such property as might be within the jurisdiction of the U.S.S.R.<sup>84</sup> But in *United States v. Belmont*,<sup>85</sup> the Supreme Court held that the United States, as assignee of the U.S.S.R. under the Litvinov Agreement, might recover the New

81. *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812); *The Beaton Park*, 65 F. Supp. 211 (W.D. Wash. 1946); *Anderson v. N.V. Transandine Handelsmaatschappij*, 289 N.Y. 9, 43 N.E.2d 502 (1942); *Hassard v. Mexico*, 29 Misc. 511 (Sup. Ct.); *aff'd without opinion*, 46 App. Div. 623, 61 N.Y. Supp. 939 (1st Dep't 1899), *aff'd mem.*, 173 N.Y. 645, 66 N.E. 1110 (1903). Even in the absence of such a request, the courts have sometimes indicated a desire for a specific declaration of executive policy. *Molina v. Comision Reguladora del Mercado de Henequen*, 91 N.J.L. 382, 103 Atl. 397 (1918); see *The Attualita*, 238 Fed. 909 (4th Cir. 1916); *United States v. Deutsches Kalisyndikat Gessellschaft*, 31 F.2d 199 (S.D.N.Y. 1929).

82. *Ex parte Peru*, 318 U.S. 578 (1943). *Compania Espanola v. Navemar*, 303 U.S. 68, 74 (1938) (dictum). The Executive's policy has been inferred in the absence of a specific ruling or request. *Sullivan v. State of Sao Paulo*, 36 F. Supp. 503 (S.D.N.Y.), *aff'd*, 122 F.2d 355 (2d Cir. 1941); *The Maliakos*, 41 F. Supp. 697 (S.D.N.Y. 1941); *American Tobacco Co. v. The Ioannis P. Goulondris*, 40 F. Supp. 924 (S.D.N.Y. 1941); *Miller v. Ferrocarril del Pacifico de Nicaragua*, 137 Me. 251, 18 A.2d 688 (1941). Where the Executive has indicated hostility, the immunity has been denied. *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945); see *Lamont v. Travelers Ins. Co.*, 281 N.Y. 362, 24 N.E.2d 81 (1939). *But cf. Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 390 (1938) (dissenting opinion of Jackson, J.).

83. The courts had occasionally been compelled to give some effect to the decrees as a begrudging *de facto* recognition. See *M. Salimoff & Co. v. Standard Oil Co.*, 262 N.Y. 220, 186 N.E. 679 (1933); *cf. McCarthy v. Reichsbank*, 259 App. Div. 1016, 20 N.Y.S.2d 450 (2d Dep't), *aff'd per curiam*, 284 N.Y. 739, 31 N.E.2d 508 (1940).

84. See *Vladikavkazky Ry. Co. v. New York Trust Co.*, 263 N.Y. 369, 189 N.E. 456 (1934). Other courts have denied extraterritorial effect to such decrees despite diplomatic recognition. *Boguslawski v. Gydnia Ameryka Linie*, [1951] 1 K.B. 162 (C.A. 1950); *Laane and Baltser v. Estonian State Cargo & Passenger S.S. Line*, [1949] Can. Sup. Ct. 530, 2 O.L.R. 641; *cf. Barclay v. Russell*, 3 Ves. Jr. 424, 30 Eng. Rep. 1087 (Ch. 1797).

85. 301 U.S. 324 (1937).

York funds of a Russian corporation from the stakeholder. Mr. Justice Sutherland, speaking for the Court, explained that recognition of the Soviet government was binding on the courts and constituted a retroactive validation of its actions from the commencement of its existence.<sup>86</sup> The effect to be given to the decree in question was deemed a proper subject for diplomatic negotiation; hence, federal policy, as expressed in the agreement, should control. A local policy against confiscation could not prevail to clog the machinery for establishing amicable relations with a foreign power given to the practice of confiscation.<sup>87</sup>

An additional complication arose in *United States v. Pink*,<sup>88</sup> where the United States, as assignee, sought to reach the nationalized assets of a Russian insurance company held by the New York Insurance Commissioner. Pursuant to a decree by the New York Court of Appeals,<sup>89</sup> the Commissioner had paid local creditors of the company from these assets and was preparing to pay foreign creditors as well when the United States intervened to claim the balance. The Supreme Court resisted the contention that the foreign creditors were deprived of property without due process of law.<sup>90</sup> The basis of the decision on this point is not altogether clear from the enigmatic opinions of the Court. But apparently the Court viewed the "vesting" of the interest as merely a manifestation of the local policy against confiscation which had succumbed to the national policy expressed by the Executive. The Court's approach to the claimants' contention does not seem to suggest that the fifth amendment is wholly inapplicable as a limitation upon such executive action.<sup>91</sup>

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86. *Id.* at 328. Nonrecognition has been given effect in denying recognition of such actions. *Latvian State Cargo & Passenger S.S. Lines v. McGrath*, 188 F.2d 1000 (D.C. Cir. 1951); *The Maret*, 145 F.2d 431 (3d Cir. 1944); *The Signe*, 39 F. Supp. 810 (E.D. La. 1941), *aff'd sub nom. The Florida*, 133 F.2d 719 (5th Cir.), *cert. denied sub nom. Tiedemann v. Estoduras S.S. Co.*, 319 U.S. 774 (1943); *The Regent*, 35 F. Supp. 985 (E.D.N.Y. 1940); *The Kotkas*, 35 F. Supp. 983 (E.D.N.Y. 1940).

87. Similar decrees have since been honored in more amicable circumstances. See *Chemacid, S.A. v. Ferrotar Corp.*, 51 F. Supp. 756 (S.D.N.Y. 1943); *Anderson v. N.V. Transandine Handelmaatschappij*, 289 N.Y. 9, 43 N.E.2d 502 (1942).

88. 315 U.S. 203 (1941).

89. *People v. Russian Reinsurance Co.*, 255 N.Y. 415, 175 N.E. 114 (1931).

90. *United States v. Pink*, 315 U.S. 203, 228-29 (1941). Local creditors held no better position. *Steingut v. Guaranty Trust Co.*, 58 F. Supp. 623 (S.D.N.Y. 1944), *modified on other grounds*, 161 F.2d 571 (2d Cir.), *cert. denied*, 332 U.S. 807 (1947); *United States v. New York Trust Co.*, 75 F. Supp. 583 (S.D.N.Y. 1946).

91. The Bricker Amendment enthusiasts read the *Pink* case otherwise. See, e.g., SCHWEPPE, *TREATIES AND EXECUTIVE AGREEMENTS* (1953).

Rather it would seem that the Executive's recognition power is subject to a minimal judicial limitation. The Constitution has no application to the actions of foreign governments and the courts cannot re-examine the Executive's recognition policy. But seemingly the Executive cannot expose private interests to destruction when the interests involved have a vitality which is independent of the sort of policy considerations prevalent in the *Pink* case. There the interests of the foreign creditors were bottomed upon the New York policy against confiscation. This policy effected an intrusion into the relation of the Russian government to its nationals; this being a problem susceptible to diplomatic solution, the Supreme Court deemed it more appropriately controlled by national policy. If the creditors had obtained judgment and levied on the property prior to the Soviet decree, the case would bear a different complexion. Their interests would not then be wholly dependent upon the local policy of dishonoring confiscatory decrees and the local law would seem to afford a more substantial basis for the assertion of a vested right. This notion may be extended to a clearer case. The Executive surely could not validate seizure of the steel mills by taking an assignment of them from the Canadian government. The executive recognition of a Canadian confiscation decree cannot be effective to divest American citizens of their rights in American property.<sup>92</sup> These latter rights have vitality independent of the general policy against confiscation. To this extent, at least, the courts seem to be capable of restraining the Executive's recognition power.

However this may be, the courts are increasingly wary of any interference with the diplomatic establishment in its determination of questions of recognition.<sup>93</sup> To an increasing extent, the jural status of the acts of foreign governments is subjected to executive determination. And while the President has on occasion called for legislative ratification of recognition policy,<sup>94</sup> Congress has never challenged executive pre-eminence; hence the legislative check, if any, is of untested strength.

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92. The United States took the Litvinov claims subject to existing statutes of limitations and setoff rights. *United States v. National City Bank*, 90 F. Supp. 448 (S.D.N.Y. 1950) (setoff); *United States v. Curtiss Aeroplane Co.*, 52 F. Supp. 328 (S.D.N.Y. 1943), *rev'd on other grounds*, 147 F.2d 639 (2d Cir. 1945) (statute of limitations). It is doubtful that the result could have been otherwise.

93. See JAFFE, *JUDICIAL ASPECTS OF FOREIGN RELATIONS* (1933); Note, *Judicial Deference to the State Department on International Legal Issues*, 97 U. PA. L. REV. 79 (1948).

94. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 224-35 (3d. ed. 1948).

## III

## THE EXECUTIVE'S POWER AS THE COMMANDER-IN-CHIEF

Of the powers of the Executive, the command of the army and navy<sup>95</sup> is least susceptible to judicial limitation. The considerations compelling judicial restraint reach the apex of their persuasiveness when the challenged executive action is military. It is not possible in the limits of this article to give careful scrutiny to all the many facets of the problem of defining the courts' relation to the military and their tribunals, even though military action may well be of the direst consequence both to our foreign relations and to the private interests of the citizenry.<sup>96</sup> Aside from the problem of judicial substitution of judgment, which has been the subject of this discourse, the courts face other problems in dealing with the military. All reckoning must begin with the constitutional fact of life that the President can ignore the judiciary altogether if he chooses to assert the military force at his command. History teaches that in time of peril the nation as a whole gives scant attention to judicial utterances.<sup>97</sup> At such times there is little for the courts to do but stand back and hold the coats. Being powerless in fact, they have generally chosen to be powerless in law.<sup>98</sup> There are in addition territorial jurisdictional problems as to how far the courts can follow the flag.<sup>99</sup>

In a few cases the courts have undertaken the awesome task of checking military power,<sup>100</sup> but the judicial check is generally a shadow

95. U.S. CONST. art. II, § 2, cl. 1.

96. See CORWIN, *op. cit. supra* note 94, c. 3; ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* (1951); REPORT ON POWERS OF THE PRESIDENT, Senate Foreign Relations and Armed Services Committee, 82d Cong. (1951).

97. When Chief Justice Taney asserted the rule of law in the trenches, his protestations fell on deaf ears. *Ex parte Merryman* 17 Fed. Cas. 144, No. 9487 (C.C. Md. 1861).

98. ROSSITER, *op. cit. supra* note 96, at 126-32.

99. *E.g.*, *Madsen v. Kinsella*, 343 U.S. 341 (1952); *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Hirota v. MacArthur*, 338 U.S. 197 (1948). *In re Yamashita*, 327 U.S. 1 (1946). See Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STAN. L. REV. 587 (1949).

100. *Duncan v. Kahanamoku*, 327 U.S. 304 (1946); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1886). Both cases held that the Executive could not, without the sanction of Congress, subject private citizens to a military trial in cases not deemed by the Court to be within the theatre of military operations. At the time of both decisions the respective wars were safely over. See *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864). The cases do not square with the Court's persistent refusal to review executive determinations as to when a war ends. See *Ludecke v. Watkins*, 335 U.S. 160, 170 (1948); Note, *Judicial Determination of the End of the War*, 47 COLUM.

of moral suasion. Congress controls the wellspring of military power; the Executive's use of it is otherwise restrainable only by the ballot box and the history book.

Despite their helpless posture, however, a function remains to the courts. It may be helpful here to distinguish the powers of the commander-in-chief from the Executive's circumstantial prerogative implied in the "faithful execution" clause. To be sure, the courts have shrunk from definitive statements of either source of power. They often use both, jointly, alternatively, or in confusion.<sup>101</sup> There has been a tendency to attribute the wartime increase in the Executive's civilian power to the role of commander-in-chief. This seems unduly confusing. The executive prerogative is coterminus with the vast "war power" of Congress;<sup>102</sup> it rises from the exigencies of the moment and is, by definition, ample to fill the need for executive war power over civilian matters. The Executive may call upon the military personnel at its command to implement decisions made in the exercise of the executive prerogative, but this does not immunize such decisions from the judicial scrutiny otherwise accorded. Where the blade is turned inward and the military acts within the legislative domain of Congress in contravention of legislative policy, the courts are likely to assert themselves on the side of Congress.<sup>103</sup> There is no need for military

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L. REV. 255 (1947). It would seem as appropriate to determine whether the fighting has ceased as to locate the fighting. Cf. *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924).

101. E.g., *United States v. Montgomery Ward & Co.*, 150 F.2d 369 (7th Cir.), *re-manded with directions to dismiss as moot*, 326 U.S. 690 (1945).

102. The war power of Congress has rested upon varying rationales. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Penhallow v. Doane*, 3 U.S. (3 Dall.) 54 (1795); *THE FEDERALIST* No. 23 (Hamilton). Extensive exercise of power by Congress during wartime has been upheld on one theory or another in *Cities Service Co. v. McGrath*, 342 U.S. 330 (1952) (power over enemy property); *Lichter v. United States*, 334 U.S. 742 (1948) (renegotiation); *Yakus v. United States*, 321 U.S. 414 (1944) (price regulation); *Korematsu v. United States*, 323 U.S. 214 (1944) (internment of citizens); *Hirabayashi v. United States*, 320 U.S. 81 (1942) (curfew); *Northern Pac. R.R. v. North Dakota*, 250 U.S. 135 (1919) (seizure of property); *Schenck v. United States*, 249 U.S. 47 (1919) (restraints on speech); *McKinley v. United States*, 249 U.S. 397 (1919) (suppression of houses of prostitution in military areas); *Selective Draft Law Cases*, 245 U.S. 366 (1918); *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1871). *But cf.* *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921) (price regulation statute set aside).

103. E.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Little v. Barreme*, 6 U.S. (2 Cranch) \*169 (1804); *United States v. Western Union Tel. Co.*, 272 Fed. 311 (S.D.N.Y.), *aff'd*, 272 Fed. 893 (2d Cir.), *rev'd on consent of parties*, 260 U.S. 754 (1922).

acumen to decide such an ultimate question of power, and though still wanting in physical power to enforce their judgments, the courts' political power is augmented by that of Congress, whose dominions they defend.

Nevertheless, as we have seen, the substantive individual rights provided by the Constitution are largely ineffectual against the power of the Executive when it is dealing with the problems of foreign relations. And this is more certainly true when the executive policy is implemented by the military services.<sup>104</sup> The difficulty of enforcement is then added to the difficulty of substituting the courts' judgment for that of the Executive. Furthermore, even though there may be a right to hearing and notice prior to a passport revocation,<sup>105</sup> it is impossible to imagine such a constitutional requirement being imposed on the military. The courts do hear jurisdictional pleas from those incarcerated by the military<sup>106</sup> and *Ex parte Milligan*<sup>107</sup> and *Duncan v. Kahana-moku*<sup>108</sup> remain as precedents for judicial reconsideration of an executive decision to displace civil courts with military. But even these meek trumpets fade to muteness during time of war. Armed with congressional limitations on the military, the courts can assist in the protection of private rights, but the courts are too fragile a bulwark standing alone.

#### IV

##### THE TREATY POWER

Despite the impassioned debate of recent years, the treaty power is probably the most easily defined of the executive powers. In negotiating treaties, the Executive represents the entire nation and not the federal government alone. Hence, the limitations on federal power set forth in article I and the tenth amendment are inapplicable to

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104. Short of trial by ordeal, there could be no more complete devastation of "rights" than that which befell Japanese-Americans in 1942. See *Korematsu v. United States*, 323 U.S. 214 (1944). The Executive was there buttressed by Congressional approval.

105. See note 70 *supra*.

106. *Hiatt v. Brown*, 339 U.S. 103 (1950); *Mullan v. United States*, 212 U.S. 516 (1909); *Smith v. Whitney*, 116 U.S. 167 (1886).

107. 71 U.S. (4 Wall.) 2 (1866).

108. 327 U.S. 304 (1946).

the treaty power exercised by the Executive and the Senate.<sup>109</sup> It is generally agreed that a valid treaty, as the "supreme law of the land" prevails over any prior statutes. The validity of a treaty can thus be challenged only as a violation of a personal guarantee of the Constitution.<sup>110</sup>

The political question doctrine has never been invoked in such a matter, but it would seem that the courts are not more capable of judging the reasonableness of policy decisions because they are embodied in a treaty. The vindication of personal rights abridged by a treaty is consequently limited in cases requiring the reappraisal of executive policy. Wholly arbitrary procedures established by treaty may be stricken by the courts and such restrictions as are imposed by the Senate may, of course, be implemented; otherwise judicial relief is rare. The effective check on the Executive's treaty power is in the hands of the Senate which must ratify the treaty.

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109. *Missouri v. Holland*, 252 U.S. 416 (1920). Herein lies the controversy that has raged about Senator Bricker's famous "which clause". The present proposal, S. Jour. 1, 84th Cong. 1955, would limit the treaty power to the confines of article I. The argument for the amendment rests on the incongruity of permitting the President and the Senate to do what Congress cannot do. The defense of the present arrangement is based on the practical need of a single national voice in foreign affairs. In view of the scope of congressional power under article I, the residue of power in question is rather insignificant and hardly worth the energy expended on it.

110. There seems to be little basis for the doubts of Bricker amenders that these guarantees limit the treaty power in the same manner as any other power of the federal government. In *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), the Supreme Court did hold Virginia debtors twice liable on the same debts by operation of the Peace Treaty of 1783. But the Court has often stated that the treaty power is not a carte blanche, and it has applied to treaties the familiar rule of construction requiring avoidance of constitutional issues if a fair reading of the treaty permits. See *United States v. Minnesota*, 270 U.S. 181 (1926); *Haver v. Yaker*, 76 U.S. (9 Wall.) 32 (1869); *Prevost v. Grenaux*, 60 U.S. (19 How.) 1 (1856); *New Orleans v. United States*, 35 U.S. (10 Pet.) 662 (1836); *United States v. Marks*, 4 F.2d 420 (S.D. Tex. 1925); *United States v. Fuld Store Co.*, 262 Fed. 836 (D. Mont. 1920). Chief Justice Taney, in the notorious *Dred Scott* case, set aside the Missouri Compromise Act implementing the Louisiana Purchase Treaty of 1803 as a violation of the fifth amendment. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). For substantiating dicta, see *Asakura v. Seattle*, 265 U.S. 332, 341 (1924) (dictum); *Geofroy v. Riggs*, 133 U.S. 258, 267 (1889) (dictum); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620 (1870) (dictum); *Doe v. Braden*, 57 U.S. (16 How.) 635, 657 (1853) (dictum). But see *Pink v. United States*, 315 U.S. 203 (1941). The present Supreme Court has not had occasion to express itself on the question. For a discussion of the cases up to *Pink*, see COWLES, *TREATIES AND CONSTITUTIONAL LAW* (1941). And see Sutherland, *Restricting the Treaty Power*, 65 HARV. L. REV. 1305 (1952).



Executive action peripheral to the negotiation of treaties has been upheld by the courts on a number of occasions. It is unlikely that the Executive has any prerogative to act outside the legislative jurisdiction where no treaty has "filled the field" which might compare with the circumstantial prerogative already considered. Outside the legislative jurisdiction there is no congressional corrective power to justify sustaining interim executive action. The courts could and probably would hold that the Executive has no quasi-legislative power whatever in such premises. But the Executive does have power to declare a treaty lapsed.<sup>111</sup> Its judgment as to the survival of a treaty after the outbreak of war or extinction of a signatory is deemed binding on the courts.<sup>112</sup>

Of much greater significance has been the appendage to the treaty power of a loosely defined "agreement power."<sup>113</sup> What is encompassed by this power has been left entirely to imagination, but it has become fashionable to equate executive agreements with treaties as the "supreme law of the land" without explanation as to how any particular agreement got that way. The confusion seems to have been sired by the opinion of Mr. Justice Sutherland in the *Belmont* case, where he treated the Litvinov Agreement as a treaty, taking no pause to explain this equation in the terms of the Constitution. It has been suggested that an agreement power is inferred from article I, section 10, which denies to the States the power to enter into treaties and other agreements with foreign nations.<sup>114</sup> This is an improvement perhaps on Mr. Justice Sutherland's complete failure of rationalization, but like Chief Justice Taft's contribution to the "executive power" clause in *Myers v. United States*,<sup>115</sup> it is well beyond the pale of liberal constitutional construction. It is obvious that there can often be no peace treaty without an armistice agreement, and that some executive agreements are essential to the conduct of foreign relations. But it is not clear why such a preliminary agreement should become municipal law simply by virtue of its bilateralness. Certainly it reduces the Senate

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111. *Charlton v. Kelly*, 229 U.S. 447 (1913).

112. *Clark v. Allen*, 331 U.S. 503 (1947); *Ivancevic v. Artukovic*, 211 F.2d 565 (9th Cir. 1954), *cert. denied*, 348 U.S. 818 (1954); *Taylor v. Morton*, 23 Fed. Cas. 784, No. 13799 (C.C.D. Mass. 1855), *aff'd*, 67 U.S. 481 (1862).

113. See Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L.J. 345 (1955).

114. Mathews, *supra* note 113, at 351.

115. 272 U.S. 52 (1926).

ratification requirement to an absurdity if the agreement power has the same breadth as the treaty power.<sup>116</sup> It would seem sounder and more in accord with a reasonable construction to rest executive agreements on the other executive powers severally; surely these other powers are sufficient to the need. It does no violence to the Constitution to say that the President may agree to do what he might do absent the agreement. Thus the Executive might make agreements which would be binding on the citizenry generally in pursuit of its powers under the authority of an act of Congress,<sup>117</sup> its recognition power,<sup>118</sup> its circumstantial prerogative, or its commander-in-chief power. The function of the courts should then be the same whether the executive action is bilateral or unilateral.<sup>119</sup> Any more precise statement of the judicial function must await clarification of the nature of the agreement power.

#### CONCLUSION

This outline of executive power has been intended only to bring into focus the problem of judicial substitution of political judgment. Whatever the inaccuracies of this analysis of executive power, the political question doctrine has demonstrated notable vitality through the years. The Supreme Court, in the *Chicago & Southern* and *Ludecke* cases, has shown little inclination to be more assertive than in the past. This seems altogether sound where the inquiry foreclosed would necessitate judicial exploration into the ganglia of the nation's foreign policy. The only choices in a case like *Chicago & Southern* are for the courts to decide questions in the dark, require executive disclosure, or declare executive impotence, or else leave the question to executive judgment. The latter seems the least obnoxious. The first is wholly impractical and the others would be debilitating to the national security. If the nation is destroyed by its incapacity for secrecy and dispatch, there can be no appeal. But the individual offended by executive tyranny may appeal to the Congress and to the

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116. See McCLURE, *INTERNATIONAL EXECUTIVE AGREEMENTS* XI (1941).

117. *E.g.*, *B. Altman & Co. v. United States*, 224 U.S. 583 (1912).

118. *E.g.*, *United States v. Pink*, 315 U.S. 203 (1942).

119. Some support may be found for this view in a recent case in the Fourth Circuit where Judge Parker held an executive agreement invalid because of a conflict with an applicable statute. *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955). See Sutherland, *The Bricker Amendment, Executive Agreements, and Imported Potatoes*, 67 HARV. L. REV. 281 (1953).

people. And where that appeal falls on deaf ears, the protection of the courts is likely to be unavailing anyway.

Until the time comes when "open covenants are openly arrived at," there seems little choice but to confide to our leaders more power than we like. The political question doctrine is additional evidence of the truth of Dean Thayer's words:

Under no system can the courts go far to save a people from ruin; our chief protection lies elsewhere. If this be true, it is of the greatest public importance to put the matter in its true light.<sup>120</sup>

The courts, in their independence and in their traditions, are the best vehicles for the protection of the individual. But if these judicial virtues are to be preserved, the judicial domain must be limited. Congress and the Executive share the constitutional obligations to the individual; the community and its leaders and not the courts, bear the primary responsibility for seeing that this obligation is fulfilled. It is a necessary feature of democracy that the self-governing are free to be self-oppressing.

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120. Thayer, *The Origin and Scope of American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 156 (1893).

